DEC 29 1993

No. 93-726

In The

Supreme Court of the United States

October Term, 1993

OMAR ZAKI GHOBASHY,

Petitioner,

-against-

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent.

Petition For Writ Of Certiorari To The New York State Court Of Appeals

REPLY BRIEF TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

It is [redacted] an error for the New York State Court of Appeals to decide that the order of the Appellate Division, First Department disbarring the applicant and removing his name from list of attorneys admitted to practice law in the State of New York, is not a final order from which an Appeal may be heard by the Court of Appeals?

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INTRODUCTION

Respondent in page (i) of his Brief states that it is not an error for the Court of Appeals to refuse to hear leave to appeal on the ground that the order appealed from is not a final order within the meaning of the Constitution. This contradicts the statement on page 4 that the Court of Appeals had decided the case on its merits. The decision was by Chief Judge only.

The charges served on Petitioner are not the charges made by the Panel, which formed up new charges at conclusion of the hearings. One of the original charges which is the charge of abuse against a client, Mr. Hassan, was dismissed by the Panel. The Panel issued a charge not previously made.

REASONS FOR GRANTING THE WRIT

General Statement

The Panel had no jurisdiction on the matter of El-Deeb, since the Chief of Disciplinary Committee dismissed the complaint as it was a fee dispute and referred it to the Bronx County Bar Association for mediation. Ms. Edelstein dispatched two letters to client and his new lawyer, which were used as a counterclaim in the action and were dismissed by the Court. She failed to submit the two letters at the request of Petitioner, and concealed them from the Panel. Despite the request of my attorney at Civil Court, Ms. Edelstein failed to submit to him papers of this case in her possession, which resulted in the dismissal of the Arbitration. This action is reinstated in Court after a new filing fee was paid and an order was made to that effect by the Court. It is a violation of

law for Ms. Edelstein to intervene in a Court case. It is not a disciplinary matter for the lawyer to sue client for his fee.

It is not a disciplinary matter for the lawyer to utilize the services of the person who introduced the client, to settle the fee without Court action. The allegation that this attorney continued to pursue the action after his discharge is untrue. This case was handled by another lawyer in the office. In Immigration cases, the new lawyer files a notice of appearance to be recognized as the attorney of record. Retiring attorney does not withdraw the papers he filed as this results in deportation of the client.

In this case, the Disciplinary panel made an attack on Petitioner on its opinion of the Court proceeding, when the case was dismissed and it had no jurisdiction to intervene in a Civil Court action. It submitted a wrong paper from the clerk of the Court that trial by the Court was not filed, when this statement is untrue as a Judge of the Civil Court had ordered a new trial. Ms. Edelstein intervened in a case dismissed by Chief of Disciplinary Panel, when she had no jurisdiction in the case. This charge should have been dismissed.

Disciplinary lawyers intervened in a Civil Court action without authority of the Court, and withheld papers necessary for the prosecution of the action. This former client testified that he obtained his residence with his original documents in his possession. Fraud was committed by new counsel against U.S. Immigration as follows:

Client had a prior non-immigrant worker's visa as a physiotherapist in New Jersey. Upon expiration of his temporary one year authorization, he came to me to apply for a renewal in New York. But his New Jersey visa had expired,

and therefore, he could not adjust his status in the United States. This adjustment in New York was previously denied, then through new counsel it was allowed. Dispute with client was that he concealed from New York the prior application of New Jersey. When requested to submit his extension of temporary status in New Jersey, as it is the practice, he failed to do so, and submitted it in New York instead. Immigration in New York advised the lawyer that they specifically asked him to submit his papers in Newark, but he failed to do so. At that time, he was resident of New Jersey. This client did not pay his fee. Disciplinary lawyer intervened in a case that was dismissed by the chief lawyer. Ms. Edelstein caused the loss of the arbitration for fee by withholding the papers. She concealed her letters from the Panel. This is an example of the cases in which the Panel found that this lawyer is a danger to the society.

Sufficient evidence was submitted on Applicant's medical and health condition at depositions and at trial, including a testimony by a doctor who testified on my behalf. The Court also observed my health condition and what they described as instability was actually strain because of the deterioration of my health. Petitioner was, in fact, taking medication during trial. It is, therefore, not true that the Panel and prosecutor were unaware of my health condition. The Appellate Division had before it medical reports and hospital reports. It was the Panel that insisted on holding the hearings at the time set. Petitioner, further, suffered a heart attack on June 12, 1992, as a result of hearing the recommendation to disbar him, which was followed by a congestive heart failure on December 1, 1992. Petitioner suffered a stroke, which caused extensive damage to Petitioner's eyesight, see Appendix A-3. Petitioner's lawyer was not allowed

an extension of time, resulting in the submission of non-notarized medical reports.

The number of the charges and of the hearings do not indicate that Petitioner had a fair trial. The Record is not against Petitioner, but contains both sides, and mostly, testimony on behalf of Petitioner. A four-session hearing is not what determines its length and fairness. The entire record should be examined. It may determine if the hearings contained credible or illegal evidence against Petitioner.

Respondent avoided the issue of the appearance of the parties, which were concealed by the Disciplinary lawyer. Their non-appearance was not disclosed until the date of the hearing. Other witnesses refused to appear, and have now disappeared; U.S. Immigration was investigating their case. Mrs. Al-Omari refused to appear and testify against this lawyer. The new lawyer, who had no knowledge of the matter, appeared. Petitioner is informed by the Insurance Company that she returned to Yemen. Immigration Service is seeking for her testimony on illegal papers filed by her deceased husband. Immigration Service is also investigating the travel agent in Brooklyn, who is producing false Yemeni documents, including the documents of the false Al-Omari family. These are the witnesses that Respondent alleges had appeared. The real witnesses did not appear, and their whereabouts had been concealed. An attempt to serve a subpoena on one of the witnesses failed because they do not reside at the addresses given and avoided service. Only one party, the wife of a former client, appeared after service on her at her work place.

The Panel asserts that mere grant of Permanent Residence disproves Petitioner's allegation of marriage fraud. The Immigration officer who appeared testified that no investigation is conducted until two years elapse from granting residence.

It is incorrectly asserted that Petitioner was being represented by an attorney in pre-trial proceeding. This is not true. Disciplinary Committee was advised that this lawyer is appearing in person.

The argument is not that the Appellate Division does not have the power to discipline an attorney, but this power is subject to appeal to the Court of Appeals and to the United States Supreme Court. The reference to the decision does not finally determine the action, and cannot be construed as the decision of the Court denying leave to appeal to the Court of Appeals. That denial renders the original order final in all respects. As a result, Petitioner was denied the right to engage in the practice of law, and his name was stricken from the list of lawyers in New York State. The order was final in all respects. Nothing else remains to be done.

Respondent argues that Petitioner was served notice of charges prior to hearing, but they were contrary to those charges that were made by the Panel at the hearing. New charges were made without notice.

With regard to the issue of the document that was taken by a complainant and turned over to the Disciplinary Committee, the Consulate of Egypt had filed charges with Disciplinary Committee and stated that it had exclusive jurisdiction over this matter, and that it was conducting an investigation of the issues. Mr. Hassan, the complainant, was

offered a settlement of his case by which he withdraws his complaint, and Ghobashy withdraws his complaint with the Government of Egypt. Mr. Hassan told the Consul General that after agreeing, he was served with a subpoena by Ms. Edelstein urging him (Mr. Hassan) not to cooperate with his own government. Chief of Disciplinary incorrectly claimed that he cannot cooperate with the investigation ongoing at the Egyptian Consulate because of confidentiality, when confidentiality was waived in writing by Petitioner. This matter should be reviewed by the Department of State. Taking papers from a file of a consulate in the United States is United States crime under United States laws.

In the case of Mr. Hassan, his new counsel requested a passport on the grounds that he will obtain his residence in Egypt, when he had applied through Peru, and eventually obtained his residence, without an attorney, in New York. The complainant did not enter Egypt with the Egyptian passport he obtained, but with a re-entry permit obtained from the U.S. Immigration, not disclosing that he was in possession of an Egyptian passport.

It is not a proper argument to state that there were several transcripts of hearings in which witnesses testified, when the Record is not before any appeal court to determine how much was in favor of Petitioner, how much illegal evidence, and how much excluded evidence without any legal basis.

The Brief of Respondent is not supported by any evidence and is taking advantage of the absence of Record before the Court. To prove his argument, he should have submitted the transcripts and points to the pages of his

argument. The cases cited are State Court cases, not controlling on this Court. We cited cases of this Court.

The Petition in Opposition also refers to the volume of the persons testifying on behalf of the Disciplinary Committee. Most witnesses were excludable and real witnesses who must have testified were prevented from appearing by the Disciplinary Committee. Those include complainants who were concealed to prevent discovery of their fraud and false filing of papers. Mr. Kahwaji and his wife did not appear and their addresses were known only to Disciplinary lawyer, who met with them and obtained their divorce papers. Instead, they brought an Immigration Officer, who is prohibited by law from appearing in a State proceeding. He appeared without the file to conceal his appearance from his supervisors and lawyers. The new lawyer who committed fraud and filed false papers was allowed to testify with the wife. The principal alien, the husband, Mr. Gallardo, was concealed.

In his Response, the Chief of Panel argues that the New York Law provides for selection of members of the Panel, who are both; judges and jury, not to be residents of the Court's county, but to have their principal place of business in New York, a provision that is illegal under U.S. Constitution. That provision tends to exclude the majority of New York City residents, who are minorities as witnessed by the membership in the Disciplinary Committee. Therefore, this lawyer of Egyptian origin was tried before a panel, which is not representative of the population of the City of New York, and who were prejudiced against this lawyer because of his national origin. The only member of the Panel who may have been impartial did not appear, and hearing was not

adjourned to ensure his appearance, or that member of the panel replaced by another member of the same background.

It is argued that members of the Panel could be selected from non-residents of the City or the Court. The law which so provides is unconstitutional as it permits members of the Panel who sit as Jury must be residents of the area under jurisdiction of the Court, and therefore the claim that a member could maintain an office for transaction of business in the County is unconstitutional. The residence of the other members of the Panel is not disclosed, nor the residence of the Panelist who did not appear and did not participate in the decision.

In fact this Panel condemned this attorney to death as he suffered a heart attack upon reading their decision to disbar him after long and distinguished service to the bar and to the United States.

All former clients were adjusted with their original documents in their possession. This attorney did not withhold any original document belonging to any former client.

Therefore, the volume of the evidence is illegal on behalf of Disciplinary. Illegal witnesses were presented. On the other hand, witnesses who testified on behalf of Petitioner were interrupted by the Panel and their testimonies were curtailed. Illegally appearing witnesses, the inability of Petitioner to subpoena witnesses, and the interruption of testimony of this attorney were the result of the prejudice of Chief Panelist.

What the Panel wrote was not a decision but was a Brief against this Petitioner, and all evidence submitted by him was concealed. The Record to which Respondent refers is not

all against Petitioner, but all evidence and testimony in support of Petitioner were omitted. Therefore, reference to the transcripts, which is not before any court, is misleading as it contains both sides of the case and evidence in support of the Petitioner.

The statement that this attorney is a danger to the society is contradicted by his record as an attorney for the American Indians in the United States and Canada for thirty years. He has good standing with U.S. legislators and New York legislators. This lawyer was allowed to pursue American Indian cases in Canada with the Candian government and was adopted as a Blood Brother by the American Indians in New York. He lectured the Green Berets at East Carolina College at Fort Braff, and served for many years in the United Nations.

It is to be noted that the issues are more than disciplinary, as they affect the national security of the U.S.A. The New York City officials were concerned on protecting illegal aliens and not cooperating with Immigration in their apprehension. The same position is taken by the New York City Courts.

Disclosure to the U.S. Immigration Service is no longer considered revealing of secrets of clients, as recently was ruled by U.S. Southern District Court in New York in a decision sent separately to the Court and served on the parties. Crime fraud exception states that communication between a lawyer and a client are not privileged if they are to further a future or an ongoing crime or fraud, cited in *Re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032 (2d Cir 1984). In all mentioned cases, when this lawyer was informed of marriage fraud by clients, and began to investigate clients, they got angry and made complaints to Disciplinary. In cases of marriage fraud, clients were living apart or already

divorced and were trying to further their applications for Permanent Residence based on marriage. In the cases which were previously denied, Petitioner was retained to file appeals, and not to pursue a previously denied application.

Although I have lost my eye sight, I am writing this brief reply to defend my honor and obtain justice, which I obtained for my clients for thirty years.

Cases cited are not rebuttal to argument of Petitioner. Respondent did not refute to distinguish any case cited by Petitioner. There is not one single decision by New York County of disbarment of an attorney on similar charges. Disbarment remains to be excessive, cruel and stands out as discrimination. See A-1, Matter of Melvin M. Kazdin. Conviction of "serious crimes" is punishable by a one-year suspension. If anything, is this the practical application of double standards?

CONCLUSION

Not only that Certiorari should be granted, but based on the papers submitted, the Court is in a position to summarily reverse the Appellate Division and dismiss the charges [redacted] or order proper selection of the Panel in accordance to U.S. Constitution and Federal methods of selection.

Dated:
New York, N.Y.
December 29, 1993

Respectfully submitted,

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Disciplinary Proceedings

Appellate Division, First Department

N.Y.L.J.
12/2/93

Matter of Melvin M. Kazdin, a suspended attorney.

Before Murphy, P.J., Sullivan, Ellerin, Kupferman and Ross, J.J.

Respondent was admitted to the Bar as an attorney and counselor-at-law in the State of New York at a Term of the Appellate Division of the Supreme Court, Second Judicial Department, on Dec. 18, 1957.

Richard M. Maltz, of counsel (Hal R. Lieberman, attorney) for petitioner; Michael S. Ross, of counsel (LaRossa, Mitchell & Ross, attorneys) for respondent.

Per Curiam – Respondent Melvin M. Kazdin was admitted to practice in New York by the Second Judicial Department on Dec. 18, 1957 and at all times relevant herein has maintained an office for the practice of law within the First Judicial Department. On Jan. 7, 1992 respondent pleaded guilty in the U.S. District Court for the Eastern District of New York to one count of tampering with a witness in violation of 18 U.S.C. §1512(b) and one count of tax evasion in violation of 26 U.S.C. §7201, both felonies under the United States Code. On May 4, 1992, respondent was sentenced to a fine of $150,000 plus a special assessment of $100, six months' electronic house arrest and five years' probation on each count, to run concurrently, as well as 400 hours of community service.

By order entered Oct. 29, 1992, this court determined that the crimes of which respondent was convicted are "serious crimes" under Judiciary Law §90(4)(d) and 22 NYCRR 603.12(b), referred the matter to the Disciplinary Committee to conduct a hearing and issue a report and recommendation to the court and suspended respondent from practice pending the determination of the disciplinary proceeding.

The Disciplinary Committee now moves to confirm the Hearing Panel's report and recommendation of a suspension of one year, retroactive to May 4, 1992, the date of respondent's federal court conviction, or until the termination of his federal probation, whichever is longer. Respondent cross-moves to confirm the report and recommendation of the Hearing Panel, including the recommendation that his reinstatement be automatic on conclusion of his suspension. We agree with the Hearing Panel's recommendation as to the appropriate sanction.

Accordingly, respondent's cross-motion is granted, respondent is suspended from the practice of law, for a period of one year, retroactive to May 4, 1992, or until the termination of respondent's federal probation, whichever is longer, with the direction that respondent be automatically reinstated on conclusion of his suspension.

All concur.

NEW YORK STATE

DEPARTMENT OF SOCIAL SERVICES (seal)

40 NORTH PEARL STREET, ALBANY, NEW YORK 12243

MICHAEL J. DOWLING
Commissioner

COMMISSION FOR THE BLIND AND
VISUALLY HANDICAPPED

SEPTEMBER 24, 1993

OMAR GHOBAS – OMAR Z. GHOBASHY
85 WILDWOOD ROAD
NEW ROCHELLE, NY 10804

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